



October 16, 2001

Ms. Elaine S. Hengen  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901

OR2001-4682

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152667.

The El Paso Police Department (the "department") received a request for all information regarding several investigations of sexual harassment or hostile work environment allegations. You claim that the submitted information, attached as exhibits C, D, and E, is excepted from disclosure under sections 552.101, 552.108, 551.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

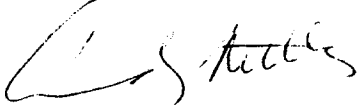
The submitted investigations are completed investigations subject to section 552.022(a)(1) of the Government Code. Section 552.022 of the Government Code makes certain information expressly public unless it is confidential by law. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Because the department asserts that the information is confidential by law and excepted under section 552.108, we will consider the department's arguments.

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 153406

Enc. Submitted documents

c: Ms. Alicia A. Wilde  
The Law Offices of Alicia A. Wilde  
4113 Marathon Boulevard  
Austin, Texas 78756  
(w/o enclosures)

We first address your arguments under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common-law right to privacy. See *Industrial Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. See Open Records Decision Nos. 393 (1983), 339 (1982). However, the identity of the individual accused of sexual harassment is not protected from public disclosure, as common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978).

You assert that, in accordance with *Ellen*, the submitted documents should be withheld from disclosure. First, we note that *Ellen* addressed the applicability of common-law privacy to information concerning investigations of sexual harassment allegations. Based on our review of the submitted information, we find that for some of the investigations, the complaining police officer neither alleged sexual harassment nor did the department conduct a sexual harassment investigation pursuant to the complainant's allegations. Accordingly, we find that the information pertaining to some of the allegations may not be withheld from disclosure on the basis of *Ellen*.

Upon careful review of the submitted information, we conclude that the investigations in exhibits C and D do not contain adequate summaries of the investigations. Thus, the department must release these exhibits after redaction of the victim's and witnesses' identifying information as required by *Ellen*. 840 S.W.2d at 525. However, exhibit E does contain an adequate summary of the investigation. Exhibits E-1 and E-6 constitute an adequate summary that the department must release after redaction of the victim's and witnesses identifying information. *Id.* We have marked such information. The department must also release the statements of those accused of sexual harassment. The department must withhold the remainder of exhibits E-2 through E-5. As for exhibit E-9, we agree the department must withhold the sexual harassment witnesses' identifying information under *Ellen*.

Next, we address the information in exhibits C and D that may not be withheld under *Ellen*. The documents contain information excepted from disclosure under section 552.117(2) of the Government Code. Section 552.117(2) excepts information that reveals the peace officers' home addresses, home telephone numbers, social security numbers, and family information. We have marked the section 552.117(2) information that the department must withhold.

The documents also contain Texas driver's license numbers that are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts information relating to a driver's license issued by an agency of this state. We have marked the driver's license numbers that the department must withhold.

You argue that release of the cellular telephone and pager numbers assigned to police officers would interfere with law enforcement efforts because the officers "need to be contacted for important job-related duties while they are away from the office or off duty" in order to make "a fast response to the scene of serious criminal offenses . . . when necessary." Furthermore, you argue that the officers "need to be in close contact with their units and to not be interrupted with non-work related pages or calls from the general public during work or in times of critical responses." In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108 protects from required public disclosure the cellular mobile phone numbers assigned to public and private vehicles used by county officials and employees with specific law enforcement responsibilities. Open Records Decision No. 506 (1988) governs this aspect of your request. Accordingly, the department may withhold the cellular telephone and pager numbers pursuant to section 552.108(b)(1).

We next address your argument that some of the submitted information is excepted from required public disclosure under section 261.201 of the Family Code. Section 552.101 of the Government Code also excepts from disclosure information that is confidential under other statutes such as section 261.201 of the Family Code. Section 261.201 provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Having reviewed the information you have marked as confidential under section 261.201, we conclude that only exhibits D-6 and E-7 are confidential under section 261.201. You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Accordingly, the department must withhold exhibits D-6 and E-7 from disclosure in their entirety under section 552.101 in conjunction with section 261.201.

Lastly, we address your argument that the information you marked in exhibit E-9 is excepted from required public disclosure under section 552.101 in conjunction with common-law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We agree that the department must withhold the information it has marked in exhibit E-9 under section 552.101 in conjunction with common-law privacy.

In summary, the department must release exhibits C and D except for the following information: the sexual harassment victim's and witnesses' identifying information must be withheld under *Ellen*; peace officers' section 552.117(2) information; Texas driver's license numbers must be withheld under section 552.130; and peace officers' cellular telephone and pager numbers may be withheld under section 552.108(b)(1). The department must release exhibits E-1 and E-6 after redaction of the sexual harassment victim's and witnesses' identifying information. The department must also release the statements of those accused of sexual harassment. The department must withhold the remainder of exhibits E-2 through E-5 under *Ellen*. Exhibits D-6 and E-7 are confidential under section 261.201 of the Family Code. Some information in exhibit E-9 is private and must be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must

appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/DKB/sdk